



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

February 21, 1947

Honorable Leroy L. Moore
County Attorney
Houston County
Crockett, Texas

Opinion V-39

Re: Whether or not the
proviso to Art.
7298, Rev. Stat.,
Vernon's Codifica-
tion, is a statute
of limitation which
must be pleaded by
the taxpayer.

Dear Sir:

We acknowledge receipt of your letter requesting an opinion upon the above titled subject matter, such letter being as follows:

"Relative to Article 7298 of Vernon's
Revised Civil Statutes of Texas:

"I know in all civil cases where the statute of limitation is used as a defense, that it is necessary to plead it in order to avail oneself of the benefits of it. Question: Would it be necessary to plead the ten year statute of limitation against road and school taxes under Article 7298 in order to get the benefit of the plea of limitation where in the provision of said article it is provided 'that no suit shall be brought'? I am wondering if the word shall used therein is mandatory or merely directory."

Article 7298 of the Revised Civil Statutes, Vernon's Codification, is as follows:

"Limitation not available. That no delinquent taxpayer shall have the right to plead in any Court or in any manner rely upon any Statute of Limitation by way of defense against the payment of taxes due from

him or her to the State, or any county, city, Navigation District, Drainage District, Road District, Levee District, town, Reclamation District, Irrigation District, Improvement District, School District and all other Districts; provided, that no suit shall be brought for the collection of delinquent taxes of a School District or Road District unless instituted within ten years from the time the same shall become delinquent."

The Court of Civil Appeals for the 7th Supreme Judicial District in Cook vs. City of Booker, 167 S.W. (2d) 232, held the proviso contained in Article 7298 of the Statutes to be a statute of limitations to be specifically pleaded in defense, saying: "The Court erred in sustaining the special exception of the school district to Appellant's plea of limitation, and permitting it to recover a judgment for the item of \$322.75, a part of which the record shows on its face was barred by the 10 years statute of limitation." * * *.

In Opinion No. O-4495, this Department, after quoting Article 7298, held:

"We think the proviso of the above-quoted statute is, strictly and properly construed, a limitation statute, and the rules and decisions governing and applicable to general statutes of limitation would apply here. Under such, it must be said that these delinquent school and road district taxes are not remitted, released or discharged by the statute cited and quoted above but same only goes to the remedy and furnishes the taxpayer a defense to an action brought for such taxes after the limitation period. The school and road district taxes in the instant case are still due and owing to the respective taxing authorities involved, despite the assertion of the taxpayer that he will invoke the applicable statute of limitation as to a portion of them. It is only the remedy for their collection which may be affected by this limitation statute. Limitation is a defense which must be specially

urged, is personal to the debtor, and may be waived by him."

The same holding was made in Opinion No. O-5095 which opinion, in turn, cited Opinion No. O-3315, as holding that the statute is one of limitation.

Furthermore, Rule 94 of the Rules of Practice and Procedure in Civil Actions is in part as follows:

"In pleading to a preceding pleading, a party shall set forth affirmatively *** statute of limitations,*** and any other matter constituting an avoidance or affirmative defense ***."

We adhere to the opinions, follow the decision and rule above quoted, and answer your question to the effect that the proviso contained in Article 7298 is a statute of limitations which must be pleaded by the taxpayer defendant in order to avail himself of the defense.

SUMMARY

The proviso appended to Article 7298 of the Revised Civil Statutes is a statute of limitations necessary to be pleaded affirmatively by the defendant taxpayer in order to avail himself of such defense of ten (10) years limitation.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By *Ocie Spear*
Ocie Spear
Assistant

OS:acm:bb

APPROVED FEBRUARY 21, 1947

Price Daniel
ATTORNEY GENERAL